Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

October Term, 1994

HYUNDAI MOTOR COMPANY, HYUNDAI MOTOR AMERICA and CENTRAL HYUNDAI COMPANY,

Petitioners,

v.

EVELYN PHILLIP, as Personal Representative of the Estate of Ann Marie Phillip, deceased,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

FRANCIS M. MCDONALD, JR., ESQ.
CABANISS, BURKE & WAGNER, P.A.
800 N. Magnolia, Suite 1800
P.O. Box 2513
Orlando, Florida 32803
Telephone: (407) 246-1800

Of Counsel

DAVID M. HEILBRON*
LESLIE G. LANDAU
MCCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorneys for Petitioners Hyundai Motor Company, Hyundai Motor America and Central Hyundai Company

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did the Court in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), make the Supremacy Clause powerless to preempt state law that directly conflicts with federal law, whenever a federal act has preemption language that does not expressly speak to the conflict at hand?

PARTIES IN THE COURT OF APPEALS

All parties in the court below are identified in the caption of this petition.[1]

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[1] Pursuant to rule 29.1, Hyundai Motor Company, Hyundai Motor America, and Central Hyundai (collectively "Hyundai") state as follows: Hyundai Motor Company has no parent. It is the parent of Hyundai Motor America, and also has the following subsidiaries that are not wholly owned: Hyundai Auto Canada Inc. and KEFICO. Hyundai Motor America and Central Hyundai have no subsidiaries that are not wholly owned.

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OPINIONS BELOW

The decision of the District Court of Appeal of Florida, Third District, affirming the judgment in this case and finding no preemption, is reported at 639 So. 2d 1064 and is reproduced as Appendix A. The Court of Appeal's decision denying Hyundai's Petition for Rehearing is reproduced as Appendix B.

JURISDICTION

The District Court of Appeal of Florida, Third District, entered its order affirming judgment for plaintiffs on July 12, 1994. (App. A-1) It denied a timely Petition for Rehearing on August 16, 1994. (App. B-1) The District Court of Appeal of Florida, Third District, is the highest court of the state in which decision could be had because the Florida Supreme Court has no jurisdiction over the case.[2] Accordingly, this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1257(a).

[2] Indeed, in opposing a stay of execution pending Hyundai's efforts to seek review in the Florida Supreme Court or in this Court, plaintiff stated that "[t]he required basis for Florida Supreme Court jurisdiction does not exist. *See* Fla.R.App.P. 9.030(a)(2)." *See* Appellee's Response to Hyundai's Motion to Stay Mandate, at 3.

STATUTORY PROVISIONS INVOLVED

This case concerns the Supremacy Clause, and the preemptive effect of the National Traffic and Motor Vehicle Safety Act, 42 U.S.C. § 30101 *et seq.* (and as formerly codified at 15 U.S.C. § 1381 *et seq.*) (the "Safety Act"), and a regulation promulgated under it, Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

The Supremacy Clause provides that federal law is "the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2.

The Safety Act's preemption clause, as codified at 15 U.S.C § 1392(d), entitled "supremacy of federal standards," provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if

> such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.[3]

The Safety Act's clause entitled "[c]ontinuation of common law liability," 15 U.S.C. § 1397(k) also (now recodified at 49 U.S.C. § 30103(e)), provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

The regulation at issue here, Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") is lengthy. It appears at 49 C.F.R. § 571.208, and its pertinent text is set out at App. C.

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[3] This was the language in force when the Hyundai at issue here was manufactured, when the claims were made, and when the preemption issue was briefed and argued. The Safety Act recently was recodified so all "laws related to transportation [appear] in one comprehensive title," and moved from Title 15 to Title 49 of the United States Code. H.R. Rep. No. 103-180, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. In the course of recodification, there were some "technical improvements" to language to promote "clarity" and "consistency" and avoid "surplusage." *Id.*; 49 U.S.C.A. § 30103, Historical and Statutory Notes. "[P]recautions [were] taken against making substantive changes in the law." H.R. Rep. No. 103-108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 820. The preemption case law discusses the provisions as codified before. To avoid confusion, this brief does also.

STATEMENT OF THE CASE

In 1966, Congress enacted the Safety Act. The Act directs the Department of Transportation and its subdivision, the National Highway Traffic Safety Administration ("NHTSA"), to issue federal motor vehicle safety standards that are "practicable," "meet the need for motor vehicle safety," and apply throughout the country. 15 U.S.C. § 1392(a) (now codified at 49 U.S.C. § 30111). The "task called for considerable expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

Congress enacted, as part of the Safety Act, an express preemption clause, and denominated it "Supremacy of Federal standards." Congress provided that "[w]henever" the Department establishes a federal standard, "no State or political subdivision of a State shall have *any* authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (emphasis added). Congress also stated, in a section denominated "continuation of common law liability," that compliance with a federal standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). However, that general "savings clause" is not denominated a preemption clause; structurally is not a part of the preemption clause; and says nothing on its face about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that

directly conflicts with a federal standard. *See* pp. 15-20, below.

In response to the Safety Act's mandate, the Department of Transportation adopted Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"). It addressed restraint systems, and expressly granted (and still grants) automobile manufacturers choices among restraint system options. In particular, FMVSS 208 expressly granted to manufacturers the option to install a 2-point automatic seat belt system "in place of" a 3-point belt system. 49 C.F.R. § 571.208, S4.1.2-S4.1.4, S4.5.3 (1971-94). Indeed, one after another Secretary of Transportation lauded the 2-point belt system, and reaffirmed that option. 39 Fed. Reg. 3834 (1974) (Secretary Brinegar); 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28984, 28999 (1984) (Secretary Dole). Secretary Dole, the Secretary of Transportation who adopted the version of FMVSS 208 at issue here, held that options, prominently including the 2-point belt option, were the best way to meet the safety goal, and that mandating any single type of passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 29001 (1984) (emphasis added).

Ann Marie Phillip was killed in a severe car accident when driving a 1988 Hyundai Excel. Plaintiff sued Hyundai, on the theory that the Hyundai was defective because it was equipped with that 2-point belt system, and not the 3-point belt system plaintiff preferred, even though FMVSS 208 expressly granted Hyundai the option to install the 2-point system "in place of" the 3-point system. (A. 24-25; R. Tr. 1512) Hyundai sought summary

judgment against plaintiff's theory, on the ground that it was preempted by federal law.[4] The trial court denied the

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[4] A wealth of authority supported, and supports, Hyundai's motion. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993), *rev. denied*, 510 N.W.2d 137 (1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal. App. 3d 980 (Cal. Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S. 2d 303 (N.Y. App. Div. 1988); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Montag v. Honda Motor Co., Ltd.*, 856 F. Supp. 574 (D. Colo., 1994); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Dallas v. General Motors Corp.*, 725 F. Supp. 902 (W.D. Tex. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Cerniak v. Nissan Motor Corp.*, 1991 WL 147366 (N.D. Ill. 1991); *Pak v. Chrysler Motors Corp.*, 1990 WL 193821 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991); *Heftel v. General Motors Corp.*, 1988 WL 19615 (D.D.C. Feb. 23, 1988); *Bass v. General Motors Corp.*, 1987 WL 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 WL 18670-71 (D. Ariz. 1986).

motion, and the matter was tried to a jury. Despite the testimony of the coroner who performed the autopsy (not a hired expert) that the accident forces, not the belts, caused Ms. Phillip's death (R. Tr. 975-79; 1005-11; 1014-15), the jury returned a $2.4 million verdict for plaintiff.

On appeal, plaintiff argued that her claim was permitted, despite its direct conflict with FMVSS 208, based on the Eleventh Circuit's decision in *Myrick v. Freuhauf, Inc.*, 16 F.3d 1516 (11th Cir. 1993), *reh'g. denied*, 24 F.3d 526 (11th Cir.), *cert. granted*, 1994 U.S. LEXIS 7039 (Oct. 7, 1994). The appellate court accepted that argument, ruling that "based on the authority of *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994) . . . we find that the National Traffic and Motor Vehicle Safety Act does not preempt the plaintiff's common law tort claims against Hyundai."[5] (App. A-3) This Court has now granted review of the *Myrick* decision. *Freightliner v. Myrick*, 1994 U.S. Lexis. 7039 (Oct. 7, 1994).

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[5] The majority also cited as support two cases that found preemption (*Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990)), and an off-point case that found no preemption where the claim did not seek to take away an expressly granted FMVSS 208 option (*Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992)). (App. A-3)

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

In *Myrick*, a sharply divided panel of the Eleventh Circuit acknowledged its earlier holding in *Taylor* that the Safety Act's preemption clause was " 'too ambiguous to manifest a congressional intent' " expressly to preempt a no-airbag claim, that the so-called savings clause did not clearly preserve the claim, and that the clauses were in "conflict." 13 F.3d at 1526 (quoting *Taylor*, 875 F.2d at 825 n. 18). Nevertheless, the *Myrick* majority read those two admittedly ambiguous and conflicting clauses to provide a "reliable indicium" of Congress' intent not to preempt any common law claim. The court concluded that the Supremacy Clause accordingly is powerless to preempt a common-law claim based on a standard that flatly conflicts with the Safety Act or an applicable FMVSS, or even to preempt a common law claim that makes it impossible to comply with the Safety Act or an FMVSS. The Florida court followed *Myrick*. (App. A-3)

This Court has now granted review of the *Myrick* decision, and *Myrick* is indeed at odds with settled law that is as old as the republic. For *Myrick* ignores a century or more of Supreme Court precedent holding that conflicting state law falls by "direct operation of the Supremacy Clause," and that even where a savings clause shows Congress' intent ***not*** to preempt, state law that directly conflicts with federal law is implicitly preempted.

If *Myrick* falls, so must this case; the decision below is based on *Myrick*. But even if *Myrick* stands, this case must fall. All three branches of government agree. Over 120 courts, including every circuit to address the issue, hold

with unprecedented unanimity that FMVSS 208 is, in the language of the case law, "unique," and preempts even if other FMVSSs do not. The Solicitor General, stating the views of the Department of Transportation and NHTSA, has already told the Court that allowing common-law claims that take away FMVSS 208 options would "obviously eliminate the diversity that the secretary found necessary," would "*disserve* the *safety* purposes of the Act," and so would "stand as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S.Ct., filed March 1990), at 14, 15 (original emphasis). And Congress has stated its intent not to "alter, change or modify in any way" the case law finding preempted claims that conflict with FMVSS 208.

FMVSS 208's preemptive effect is critical to the automotive industry. For claims that take away federally granted FMVSS 208 options, if allowed, would turn every car accident on the road into a potential tort case, and a referendum on the policy embodied in FMVSS 208. For every car is equipped with a restraint system authorized by FMVSS 208. Every person injured in every accident could claim that a different FMVSS 208 option should have been chosen in their car, and seek to punish the manufacturer for choosing an option federal law found essential to meeting the safety goal. That destruction of federal goals should not be permitted, especially as an unintended consequence of the Court's decision in *Myrick*.

The Court should grant certiorari here. In the alternative, we ask that the Court hold the petition pending the decision in *Myrick*.

II. THE PREEMPTION DECISION IN THIS CASE IS BASED ON *MYRICK*, AND CERTIORARI SHOULD BE GRANTED FOR ALL THE REASONS IT WAS GRANTED IN *MYRICK*.

A. In Foreclosing Implied Preemption Analysis, *Myrick* Misreads This Court's Cases, And Violates Settled Preemption Principles Laid Down In Them.

In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1993), this Court held that where an Act's preemption clause provides "a 'reliable indicium of congressional intent with respect to state authority,' " and where "other provisions" of the Act "offer no cause to look beyond" the preemption clause, there is no "need" to look beyond it. 112 S. Ct. at 2618. The *Myrick* majority interpreted that language to add a "new wrinkle to the fabric of pre-emption law," and a "clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption," even in the face of a direct conflict between state and federal law, or even when a state-law rule makes compliance with federal law impossible. 13 F.3d at 1521-22.

In fact, the language from which the *Myrick* majority inferred that "new wrinkle" is not new at all. That language is at least 14 years old. *See e.g., California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) ("[T]here is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [preemption] sections provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practice") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978). It

never before was imagined to preclude conflict preemption analysis, much less mandate that state law prevails and federal law falls (the opposite of what the Supremacy Clause commands) when state law directly conflicts with federal law.[6]

The Supremacy Clause provides that federal law is the "supreme law of the land." Therefore, a state law that

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[6] *Myrick* also cited, as support for its rule foreclosing conflict preemption, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993). *CSX* considered whether state tort claims regarding a warning device at a railroad crossing were preempted by the Federal Railroad Safety Act (FRSA). The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The Court stated that an express preemption clause is *not* dispositive: "If the statute contains an express pre-emption clause, the task of statutory constriction must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). The Court looked at the federal regulations at issue, judged that they did not cover the same subject matter as the tort claims, and so held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court then "reject[ed] petitioner's claim of implied 'conflict' preemption, * * * on the basis of the preceding analysis." 113 S. Ct. at 1742 n.12.

The *Myrick* majority read that to mean a "separate implied pre-emption analysis" was precluded because the statute contains an express preemption clause. 13 F.3d at 1524. But we submit that Judge Hill, in dissent, read *CSX* correctly: the Court simply found that federal law did not "cover" the same subject as the state common law in issue, and accordingly "did not conduct an implied conflict pre-emption analysis because . . . it found no conflict" between state and federal law. *See* 13 F.3d at 1530 (Hill, J., dissenting).

conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l. Union*, 468 U.S. 491, 501 (1984). Indeed, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962). That basic rule is as old as the Republic, and *Cipollone* certainly did not change it, much less with a passing sentence that echoed settled law.

Indeed, the Court's own analysis – just before and then after *Cipollone* – confirms that the basic rule is still the law. Just a week before *Cipollone*, this Court found that a state law "in conflict" with federal law was implicitly preempted despite an express preemption clause, and, quoting *Free v. Bland*, reaffirmed that basic rule. *Gade v. National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2388 (1992).[7] Just last term, this Court "discern[ed] no solid basis for believing that Congress," when it included both a preemption clause and a savings clause in an Act, "intended fundamentally to alter traditional preemption analysis." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993). Thus, it held that the saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal

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[7] *Gade* also observed that "our pre-emption categories are not 'rigidly distinct.' " 112 S. Ct. at 2386, n.2. *Myrick* comments that *Gade* was decided by a plurality. 13 F.3d at 1523. But 3 of the 4 members of that plurality (Chief Justice Rehnquist, and Justices White and O'Connor) were also members of the *Cipollone* plurality whose language *Myrick* relied on.

preemption occurs." *Id.* (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

In a long line of preemption decisions, this Court has considered – and, indeed, adopted – implied preemption arguments regarding statutes with express preemption clauses. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-42 (1990) (ERISA); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509-22 (1989) (Natural Gas Act); *Jones v. Rath Packing Co.*, 430 U.S. 519, 538-43 (Fair Packing and Labeling Act), *reh'g. denied*, 431 U.S. 925 (1977).[8] In fact, over a century of case law makes clear that, even where an act has a common law savings clause and no preemption clause at all, the Supremacy Clause preempts state common law that directly conflicts with federal law. Thus in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Supreme Court held preempted an existing but conflicting common-law claim in the face of a savings clause, because a savings clause "cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94, 493 n.13 (1987) (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law;" Senate Report said "[c]ompliance with . . . Act

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[8] As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.), *reh'g. denied*, 114 S. Ct. 2771 (1994).

would not be a defense to a common law action for . . . damages," conflicting common law claims preempted; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"). *Accord Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956), *reh'g denied*, 351 U.S. 934 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980).

Myrick proposed that *Cipollone* changed all that law, without mentioning it, and with this startling consequence: (1) A state law that "interferes with and frustrates" federal law – in other words, flatly conflicts with it – is impliedly preempted absent any preemption clause in the federal statute the state law flatly conflicts with. But (2) that state law is not impliedly preempted if the federal statute the state law conflicts with contains a preemption clause and that clause does not expressly preempt the state law. So (3) a federal statute has greater preemptive force as to a conflicting state law if it does not have a preemption clause than if it does. In fact, (4) according to *Myrick*, "when there is an express pre-emption provision we should not consider implied pre-emption" at all, even though a state law flatly conflicts with federal law, and indeed even when it is absolutely "impossible" to comply with federal law if one complies with the state law, and vice versa. 13 F.3d at 1519, 1522.

Cipollone did not hold that when Congress enacts a preemption clause, it gives the Act less preemptive force,

not more, than the Act would have without the clause. And *Cipollone* did not overrule a century of authority, and the settled principles that authority lays down, without mentioning it.

The Eleventh Circuit's decision was thus a radical departure from this Court's settled precedents, and other lower courts' understandings of them. *See, e.g., Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (1994) (court does "not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. . . . Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority' ") (quoting *Cipollone*, 112 S. Ct. at 2618); *Gills*, 829 F. Supp. at 897 (*Cipollone* "broke no new ground").

B. In Rejecting Express Preemption, *Myrick* Reads The Safety Act's Preemption Language In Contravention Of *Cipollone* And In Direct Conflict With The Readings Given Similar Language By Other Courts.

The *Myrick* majority rejected express preemption, based on its pre-*Cipollone* holding in *Taylor* that common law claims did not fall within the Safety Act's express preemption provision because Congress failed to " 'make explicit reference to state common law in the Act's preemption clause.' " 13 F.3d at 1520 (citing *Taylor*, 875 F.2d at 824). But that rationale was repudiated by *Cipollone*,

which held that the express preemption provision at issue in that case included common law duties even though it spoke only of " 'requirement[s] or prohibition[s] * * * imposed under State law.' " 112 S. Ct. at 2619-21. The Court reasoned that since state " 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief,' " the preemption clause encompassed common-law actions, even though the clause did not expressly mention common law. *Id.* That reasoning applies here, squarely.

Indeed, since this Court's decision in *Cipollone*, seven circuits have addressed the issue of federal preemption under analogous statutes and concluded that preemption of state law "requirements" or "standards" necessarily meant that Congress intended expressly to preempt common law claims.[9] Following *Cipollone*, the overwhelming majority of courts across the country have found express preemption based on preemption clauses that do not mention common law, under numerous federal health

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[9] *See Gile v. Optical Radiation Corp.*, 22 F.3d 540, 542 (3rd Cir. 1994); *Worm v. American Cynamid Co.*, 5 F.3d 744, 748-49 (4th Cir. 1993); *King v. E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (lst Cir.), *cert. dismissed*, 114 S. Ct. 490 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir.), *reh'g. denied*, 1993 U.S. LEXIS 17385 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Stamps v. Collagen*, 984 F.2d 1416, 1424 (5th Cir.), *cert. denied*, 114 S. Ct. 86 (1993).

and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*,[10] the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*,[11] the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360c, *et seq.*,[12]

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[10] *See, e.g., MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham v. Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen v. Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co. v. MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms v. American Cyanamid Co.*, 840 F. Supp. 694, 696 (D. Minn. 1993); *DerGazarian v. Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich v. Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque v. Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper v. E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson v. Dow Chem. Co.*, 842 F. Supp. 938, 939 (E.D. Ky. 1992); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *June v. Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-46 (N.C. Ct. App. 1993).

[11] *See, e.g., Moss v. Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), *cert. denied*, 113 S. Ct. 2999 (1993); *DeHaan v. Whink Prods. Co.*, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar v. Whink Prods. Co.*, 1994 WL 115876, *2 (Colo. Ct. App. Apr. 7, 1994); *State ex rel. Jones Chemicals, Inc. v. Seier*, 871 S.W.2d 611, 613 (Mo. Ct. App. 1994).

[12] *See, e.g., Mendes v. Medtronic, Inc.*, 18 F.3d 13, 16 (lst Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130, 1134-35 (lst Cir.), *cert. denied*, 114 S. Ct. 84 (1993); *Slater v. Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), *cert. denied*, 113 S. Ct. 327 (1992); *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994); *Griffin v. Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker v. Collagen Corp.*, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Michael v. Shiley, Inc.*, 1994 WL 59349, *7 (E.D. Pa. Feb. 25, 1994); *Kemp v. Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter v. Zimmer, Inc.*, 830 F. Supp. 199, 203

and the Federal Boat Safety Act, 46 U.S.C. § 4301, *et seq.*[13]

The Eleventh Circuit's rejection of express preemption in *Myrick* thus conflicts with this Court's decision in *Cipollone* and the scores of federal and state court decisions post-*Cipollone* finding express preemption in similar contexts. It also conflicts with this Court's long-standing understanding that common law standards are "standards." *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to state common law "safety standards"); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

In finding no express preemption, the Eleventh Circuit also relied on its prior holding in *Taylor* that the Safety Act's so-called savings clause forecloses express preemption of common law liability for it would otherwise be "a mere redundancy." 13 F.3d at 1520 (citing *Taylor*, 875 F.2d at 823-25).[14] The savings clause, however,

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(S.D.N.Y. 1993); *Cameron v. Howmedica, Div. of PfizerHosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker v. Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992); *Covey v. Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D . Ohio 1993).

[13] *See, e.g., Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. Ct. App. 1992), *app. denied*, 616 N.E.2d 333 (1993).

[14] The *Myrick* majority also noted that the statute in *Cipollone* lacked a savings clause 13 F.3d at 1527. That cannot be dispositive, however, because this Court found express preemption of common law claims in *CSX*, and the FRSA has a savings

serves two important functions, well grounded in Supreme Court jurisprudence: (1) it shows that Congress has not "occupied the field" of safety regulation, for savings clauses are meant "not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections – but to preserve all existing rights which were not inconsistent with those created by the statute";[15] and (2) it preserves common law actions that do not conflict with, or frustrate the purpose of, applicable federal safety standards, even if they relate to the "same aspect of performance."[16] In contrast, the function ascribed to the clause by *Myrick* – saving even claims that directly undermine the Act – is long rejected in Supreme Court jurisprudence. *See Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *Chicago & N.W.*

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clause. *See* 113 S. Ct. at 1736; *see also Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-40 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

[15] *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *accord Chicago & N.W. Transp. Co.*, 450 U.S. at 328 (savings clause included because without it, " 'it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts' ") (quoting *Puritan*, 237 U.S. at 130).

[16] FMVSS 208 expressly grants, for safety reasons, a choice among restraint system options. The savings clause thus would preserve a common law claim that a chosen option was negligently manufactured. But it would not preserve a common law action, such as the claims here, seeking to recover damages from a defendant for exercising one option, instead of another. *See, e.g., Perry*, 957 F.2d at 1265 (distinguishing a failure-to-install claim from a claim that a chosen system was not properly designed, and holding that the latter claim is not preempted).

Transp. Co., 450 U.S. at 328-31; *Offshore Logistics, Inc.*, 477 U.S. at 210-11; *Arrow Transp. Co.*, 372 U.S. at 671 n.22; *T.I.M.E. Inc.*, 359 U.S. at 473-74; *Nelson*, 350 U.S. at 501 n.10; *Gulf Oil Corp.*, 601 F.2d at 1086. *See also Morales*, 112 S. Ct. at 2037 ("general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision"); *John Hancock*, 114 S. Ct. at 526 (saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs") (citing *Silkwood*, 464 U.S. at 248). Indeed, if *Myrick* were right that the existence of a preemption clause forecloses preemption of anything not covered by the clause, the savings clause would serve no purpose at all.

Even if *Myrick* were right that the existence of a savings clause and preemption clause means there is no express preemption, at a minimum, *Cipollone* adds force to the Safety Act's preemption clause. Even before *Cipollone*, all four circuits to address the question concluded that the savings clause, § 1397(k), shows that § 1392(d) is not a "reliable indicium" of Congress' preemptive intent on the matter at hand, and so "offers cause to look beyond" § 1392(d). As the First Circuit summed it up, the "Safety Act is thus ambiguous as to . . . whether a state product liability claim . . . which seeks to hold an automotive manufacturer liable for failing to adopt a standard 'not identical' to a federal safety standard covering the 'same aspect of performance' . . . is *preserved* by section 1397(c) [or] preempted by § 1392(d)." *Wood*, 865 F.2d at 398

(emphasis in original).[17] The savings clause is stronger after *Cipollone*, and so sharpens the conflict that the courts already had found between the preemption clause and the savings clause. Consequently it underlines the ambiguity of each, and accordingly, far from foreclosing implied preemption analysis, compels it. Again, other cases have so held; *Myrick* stands in stark contrast. *See, e.g., Boyle*, 501 N.W.2d at 871 ("Because the explicit preemption clause and the savings clause appear to conflict, neither clause 'provides a reliable indicium of congressional intent with respect to state authority.' The existence of two clauses dealing with preemption that appear to conflict compels us to look beyond the express preemption provision.") (quoting *Cipollone*); *Marrs*, 852 S.W.2d at 575-76; *Gills*, 829 F. Supp. at 899.[18]

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[17] *Accord Taylor*, 875 F.2d at 825 (finding "conflict between the language of the Safety Act's preemption and savings clauses" and "conclud[ing] that the Safety Act cannot be construed as unambiguously manifesting an intention to preempt appellants' common law claims."); *Pokorny*, 902 F.2d at 1121; *Kitts*, 875 F.2d at 789 (following *Wood*); *Heath*, 756 F. Supp. at 1147 (the "savings clause, when considered in combination with the preemption clause, makes ambiguous Congress' intent with respect to preemption of state common law claims").

[18] The implied preemption analysis is also compelled by the regulation itself, even apart from the conflicting statements of Congress. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings*, 458 U.S. at 154. The proper inquiry is "whether the federal agency has properly exercised its own delegated authority." *City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988). Thus, "[s]o long as an agency has statutory authority to issue

In sum, after *Cipollone*, there are two alternatives: Either: (1) the Safety Act's preemption clause expressly preempts common law claims that conflict with an on-point FMVSS, an argument that *Cipollone* makes even more forceful; or (2) the preemption clause, taken with the savings clause, is not a "reliable indicium" of Congress' intent, so there is "cause to look beyond" it, under *Cipollone*, to implied preemption.

* * *

The Florida appellate court's preemption decision in this case is squarely based on *Myrick*. Just as the Court granted certiorari in *Myrick*, it should grant certiorari here. In the alternative, the Court should hold this Petition pending its decision in *Myrick*, and in the event of a reversal, grant certiorari and either decide this case or vacate the Florida court's decision, and remand the case for decision in accordance with this Court's decision in *Myrick*.

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regulations, those regulations will preempt inconsistent state [law] by the simple operation of the Supremacy Clause." *Lincoln Sav. and Loan Assn. v. Federal Home Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988). Here, NHTSA acted under a broad delegation of congressional power. NHTSA acted within its authority in granting FMVSS 208's options. *Public Citizen v. Steed*, 851 F.2d 444, 450 (D.C. Cir. 1988); *State Farm Mutual Ins. Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied, New York v. Dole*, 480 U.S. 951 (1987). That federal option-based regulation preempts state law claims that would take any of the options away. Pp. 24-27, below.

III. EVEN IF MYRICK IS AFFIRMED, CERTIORARI IS APPROPRIATE HERE.

Whatever the decision on the merits in *Myrick*, the Court should grant certiorari here. For the issue in any preemption case is whether Congress intended to preempt a state law that, as applied in the case at hand, flatly conflicts with the federal statute – or regulations under the statute – that contains the clause. Whatever the preemptive effect of FMVSS 121, the federal standard at issue in *Myrick*, FMVSS 208 preempts plaintiff's claims here. For all three branches of the United Sates government have concurred that, whatever the effect of other regulations, FMVSS 208 preempts claims that would take away its options.[19]

The reasons are simple: FMVSS 208 is unique in the Safety Act, and claims like plaintiff's are unique in Safety Act litigation. *See, e.g., Wood*, 865 F.2d at 413, 418 (FMVSS 208 claims are "unique" and "first raised" the preemption issue); *Gills*, 829 F. Supp. at 897 (referring to FMVSS 208's "unique characteristics"); *Welsh v. Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) ("FMVSS 208 is an unusual regulation"). Congress mandated in 1974, in then-§ 1410(b) of the Safety Act, that NHTSA grant manufacturers restraint system options. No other provision of the Safety Act mandates options of any kind, as to any other regulation. FMVSS 208, in turn, grants manufacturers those restraint system options. No other safety

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[19] For sake of simplicity, we will refer to the *Myrick* claims, which arguably conflict with FMVSS 121, as the "FMVSS 121 claims," and to claims that take away an FMVSS 208 option as "FMVSS 208 claims."

regulation shares FMVSS 208's rich regulatory history reflecting NHTSA's conclusion, over years, that options are the best means to the safety goal, and that mandating a single kind of passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 29001 (1984). Moreover, most Safety Act standards are performance, not design, standards. The "usual common law action for design defect," however, "creates a design standard rather than a performance standard." Therefore, a "direct conflict between a common law design standard and a Safety Act performance standard" is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9, 416. FMVSS 208 speaks to particular types of restraint systems, and how they are designed. Thus, it uniquely has "elements of a design standard," and so FMVSS 208 claims present that "rare event." 865 F.2d at 417.

Finally, FMVSS 208 claims are unique because they potentially affect every car on the road. For every car has a restraint system and every accident potentially involves the restraint system; if people can second guess the federal option installed in every car, every accident becomes a potential FMVSS 208 case.

A. The Courts Have Held That, Because FMVSS 208 Is Unique, It Preempts Even If Other FMVSSs Do Not.

An overwhelming body of case law – essentially unanimous, until *Myrick* (n.3 above) – has found FMVSS 208 claims preempted. Some reach that conclusion by the express preemption route. They reason that Congress

meant what it said in the preemption clause, and preempted "any" state "standard" – including a common law "standard" – that is not "identical" to an on-point FMVSS. FMVSS 208 claims are premised on a common-law rule that would punish a manufacturer for choosing one FMVSS 208 option, rather than plaintiff's preferred option, and in effect requires the preferred option and takes away the option the manufacturer installed. That common-law standard is not "identical" to FMVSS 208, but flatly conflicts with it, and so is expressly preempted by the plain terms of § 1392(d). *See, e.g., Miranda*, 647 A.2d at 174; *Boyle*, 501 N.W.2d at 869; *Gills*, 829 F. Supp. at 898-99; *Montag*, 856 F. Supp. at 577; *Wattelet*, 676 F. Supp. at 1040; *Vanover*, 632 F. Supp. at 1096-97; *Cox*, 646 F. Supp. at 763; *Wickstrom*, 416 N.W.2d at 840; *Heftel*, 1988 WL 19615 at 2; *Nissan Motor Corp.*, 212 Cal. App. 3d at 982.

Other courts reach the preemption conclusion based on implied preemption. They reason that, even if Congress' express intent is unclear, FMVSS 208 claims conflict with the purposes of Congress and the Department of Transportation, in at least two ways. First, Congress mandated options in § 1410b, and the Department mandated them in FMVSS 208 because options, not a single kind of restraint system, best served the safety goal. Following this Court's decision in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982), the courts held that a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized [one] to do.' " *Taylor*, 875 F.2d at 827. *Accord Pokorny*, 902 F.2d at 1125; *Wickstrom*, 416 N.W.2d at

841; *Baird*, 654 F. Supp. at 32; *Cox*, 646 F. Supp. at 763-64; *Dallas*, 725 F. Supp. at 906.

Second, FMVSS 208 claims destroy the uniformity of federal standards that Congress intended. FMVSS 208 allowed manufacturers a choice among restraint systems, and applied throughout the country. A state regulation requiring plaintiff's chosen system, not other options, would not be "identical" to that nationwide option-based rule, would effect non-uniformity, and so would be expressly preempted by § 1392(d). *Wood*, 865 F.2d at 408-09. Plaintiff's claim would require the same thing as that prohibited regulation, would be "tantamount to establishing" a "conflicting" state regulation, and so would have essentially the same "effect." *Wood*, 865 F.2d at 401-02, 410-11, 418 (quoting *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987)).[20] For if a Florida jury can require a particular option, and so impose a different standard from FMVSS 208, so can juries in other states. The upshot would be a patchwork of different restraint standards in different states, and a car lawful in one state would become unlawful when driven to another. *See Hughes*, 677 F. Supp. at 77-78 ("the vagaries of jury standards of safety could result in a different result in each suit brought"). That "type of ad hoc regulation is exactly what Congress sought to exclude. . . . " *Vanover*, 632 F. Supp. at 1096. FMVSS 208 claims thus would "destroy the national uniformity of the federal

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[20] As *Cipollone* holds, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 395 U.S. 236, 247 (1959)).

standard and exceed the state's authority." *Wood*, 865 F.2d at 412. *Accord Kitts*, 875 F.2d at 789; *Wickstrom*, 416 N.W.2d at 841; *Staggs*, 678 F. Supp. at 272; *Hughes*, 677 F. Supp. at 77-78; *Cox*, 646 F. Supp. at 763-64.

In sum, the courts have held that FMVSSs are not all created equal for purposes of preemption, and have concluded that FMVSS 208 preempts, even though other FMVSSs do not. *Compare, e.g., Pokorny*, 902 F.2d at 1125 (3rd Cir. 1990) (Third Circuit finds FMVSS 208 preempts), *with Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) (same court finds FMVSS 108 does not preempt); *compare Cox*, 646 F. Supp. 761 (FMVSS 208 preempts), *with Welsh v. Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) (same court finds FMVSS 213 does not preempt because, unlike FMVSS 208, it "does not permit a manufacturer to choose among options"); *compare Kolbeck*, 702 F. Supp. 532 (Pennsylvania district court finds FMVSS 208 preempts), *with Swope v. SIT Transit Corp.*, 796 F. Supp. 160, 164 (E.D. Pa. 1992) (same court finds FMVSS 108 does not preempt because, unlike FMVSS 208, it "does not contemplate a flexible scheme that would be undermined by an imposition of common law liability").

B. The United States Has Stated That FMVSS 208 Preempts Common Law Claims That Take Away Its Options; The Government Has Not Expressed That View As To Any Other Regulation Or Common Law Claim.

NHTSA has made clear its view that federal law preempts FMVSS 208 claims like this one; NHTSA has not

expressed that view as to the effect of any other common law claim or any other regulation. In 1990, in response to a request from this Court, the Government filed a brief in the Court opposing certiorari in several federal circuit court cases finding FMVSS 208 preemption. The Government's brief speaks specifically to Secretary Dole's "final" rule, the version of FMVSS 208 that applied to the Hyundai here. The Government explained that diversity was a "critical feature" of that regulation, and that it reflected "the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle." Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S. Ct., filed March 1990), at 13. The Government concluded that claims imposing damages for a manufacturer's failure to install airbags would "obviously eliminate the diversity that the secretary found necessary," would "*disserve* the *safety* purposes of the Act," and so would "stand as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. *Id.* at 14, 15 (original emphasis).

C. Congress Expressly Stated Its Intent Not To Change The Preemption Case Law Under FMVSS 208.

At NHTSA's request, and again unique in Safety Act litigation, Congress has expressed its intent not to change the case law preempting airbag and other FMVSS 208 claims. Congress has not expressed that intent as to any other body of Safety Act case law of any kind.

Congress amended the Safety Act in 1991 to require airbags, prospectively. *See* Pub. L. No. 102-240, § 2508. In the House Conference Report, NHTSA alerted Congress that "most courts that have considered the matter have ruled that ["no airbag" claims, one kind of FMVSS 208 claim] are preempted by the [Safety Act] and/or the safety standards issued by NHTSA." Nov. 7 letter from NHTSA cited in H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. NHTSA also cautioned Congress that the amendments could call these preemption rulings into question, and that if Congress adopted a mandatory-airbag rule, it was "possible that some courts would conclude that these claims are no longer preempted." *Id.*

Congress responded by specifying that the 1991 amendment requiring airbags prospectively

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240, § 2508(d).

Thus, having been specifically apprised of the overwhelming authority finding claims like plaintiff's preempted, Congress expressly did "not want by this section to change" those cases. H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. Congress' express acceptance of the case law interpreting the preemptive reach of FMVSS 208 confirms that its legislative intent was properly gauged by that case law. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267,

275 (1974); *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of Florida, Third District. In the alternative, the Court should hold this Petition and then either grant review or vacate the court of appeal's decision and remand the case for reconsideration in light of *Myrick* until the disposition in *Myrick*.

Respectfully submitted,

DAVID M. HEILBRON*
LESLIE G. LANDAU
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorneys for Petitioners Hyundai Motor Company, Hyundai Motor America and Central Hyundai Company

*Counsel of Record

November 11, 1994.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, 1994

HYUNDAI MOTOR COMPANY (KOREA), et al.,	**	
Appellants,	**	CASE NO.
vs.	**	93-1234
EVELYN PHILLIP, as Personal Representative of the Estate of ANN MARIE PHILLIP, deceased,	**	
Appellee.	**	

Opinion filed July 12, 1994.

An Appeal from the Circuit Court of Dade County, Maria M. Korvick, Judge.

Cabaniss, Burke & Wagner, Francis M. McDonald, Jr., Tracy Troutman Cheek, Orlando, and Leslie Landau, Miami, for appellants.

Cooper & Wolfe, Michael Seth Cohen, Marc Cooper and Maureen E. Lefebvre, Miami, for appellee.

Before BARKDULL, JORGENSON and GODERICH, JJ.

GODERICH, Judge.

The defendants, Hyundai Motor Company (Korea), Hyundai Motor America, and Central Hyundai Company

d/b/a Central Hyundai [collectively referred to as "Hyundai"], appeal from an adverse jury verdict. We affirm.

Hyundai installed an automatic belt or passive restraint system that consists of a two-point shoulder belt without a lap belt, a reinforced ramped seat and an enhanced knee bolster in its 1988 Hyundai Excel which was one of the types of restraint systems authorized by Federal Motor Vehicle Safety Standard 208 [FMVSS 208], 49 C.F.R. § 571.208 (1987), a safety standard established by the National Traffic Safety Administration pursuant to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq. Ann Marie Phillip was involved in an accident while driving a 1988 Excel. As a result of the accident, her liver was cut in half and she died. Evelyn Phillip, as personal representative of the estate of her daughter, Ann Marie, filed a complaint against Hyundai alleging negligence and strict liability in the design of the restraint system in the 1988 Excel. Hyundai moved for summary judgment on the ground that the plaintiff's claim was preempted as a matter of law. The trial court denied the motion.

The jury found the restraint system defective and awarded the plaintiff $2.4 million. The trial court summarily denied Hyundai's motion for new trial and remittitur. Hyundai appealed.

Hyundai contends that the trial court erred in denying Hyundai's motion for summary judgment where federal law (FMVSS 208 and its enabling legislation, the National Traffic and Motor Vehicle Safety Act) preempts

the plaintiff's claim that the car was defective because of the lack of a lap belt. We disagree.

Based on the authority of *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994); *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1990), we find that the National Traffic and Motor Vehicle Safety Act does not preempt the plaintiff's common law tort claims against Hyundai.

Next, Hyundai argues that the trial court abused its discretion in denying its motion for a new trial where the following prejudicial error were committed during trial: (1) plaintiff's counsel referred to other lawsuits and accidents despite the trial court's order in limine prohibiting reference to other lawsuits; (2) the trial court failed to grant Hyundai's motion for directed verdict despite plaintiff's failure to introduce facts to support her claims; and (3) the trial court did not permit Hyundai to exercise a peremptory challenge as to juror Wilson, forcing Hyundai to accept juror Wilson.

The trial court granted Hyundai's request for a motion in limine that prohibited the plaintiff from introducing "any evidence of the number or magnitude of other claims and accidents without prior court approval." Hyundai claims that plaintiff's counsel repeatedly violated this ruling during its cross examination of Hyundai's expert, Terry Thomas. A careful review of the record, however, shows that the plaintiff did not violate

this order. Moreover, the plaintiff did not improperly elicit any testimony of dissimilar accidents. *See Railway Express Agency, Inc. v. Fulmer,* 227 So. 2d 870 (Fla. 1969); *Chambers v. Loftin,* 67 So. 2d 220 (Fla. 1953); *Short v. Allen,* 254 So. 2d 34 (Fla. 3d DCA 1971). The jury merely heard the phrase "the Alvarado case" three times, with no further details or explanation. Accordingly, the trial court did not abuse its discretion in denying Hyundai's motion for mistrial on this ground. *See Compania de Aviacion v. Knapp,* 251 So. 2d 18 (Fla. 3d DCA), *cert. denied,* 256 So. 2d 6 (Fla. 1971); *Morin v. Halpern,* 139 So. 2d 495 (Fla. 2d DCA 1962).

We cannot review Hyundai's contention that it is entitled to a directed verdict because of a lack of proof that an accident occurred because it did not timely object when the plaintiff's experts recounted the facts of the accident. *See Tallahassee Furniture Co., Inc. v. Harrison,* 583 So. 2d 744 (Fla. 1st DCA 1991), *rev. denied,* 595 So. 2d 558 (Fla. 1992); Frank v. Ruwitch, 318 So. 2d 188 (Fla. 3d DCA 1975), *cert. denied,* 330 So. 2d 725 (Fla. 1976); *Nat Harrison Assocs., Inc. v. Byrd,* 256 So. 2d 50 (Fla. 4th DCA 1971).

Similarly, there is nothing for this court to review on the peremptory challenge issue because Hyundai withdrew its challenge to juror Wilson. *See Santa Fe Dev. Corp. v. Randolph,* 506 So. 2d 18 (Fla. 3d DCA 1987).

For the foregoing reasons, we affirm the final judgment entered on the jury verdict in favor of the plaintiff.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1994
AUGUST 16, 1994

HYUNDAI MOTOR COMPANY (KOREA), et al.,	**	
Appellants,	**	CASE NO.
vs.	**	93-1234
EVELYN PHILLIP, as Personal Representative of the Estate of ANN MARIE PHILLIP, deceased,	**	
Appellee.	**	

Upon consideration, "Appellants, Hyundai Motor Company, Hyundai Motor America and Central Hyundai Company's Motion for Rehearing" is hereby denied. Barkdull, Jorgenson and Goderich, JJ., concur.

A true Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court
of Appeal, Third District

By /s/ Anita Illegible
Deputy Clerk

cc: Tracy Troutman Cheek
Sharon L. Wolfe
[SEAL]

Michael Seth Cohen
Leslie G. Landau

§ 571.208 Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972, to August 31, 1973.* Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3

S4.1.1.1 *First option – complete passive protection system.* The vehicle shall meet the crash protection requirements of S5. by means that require no action by vehicle occupants.

S4.1.1.2 *Second option – lap belt protection system with belt warning.* The vehicle shall –

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat

belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2. may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option – frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option – head-on automatic protection system.* The vehicle shall –

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of

S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seatbelt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No.

209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.2.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with the requirements of S4.1.2.1, shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the

requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cares during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

* * *

S4.1.4 Passenger cars manufactured on or after September 1, 1989, but before September 1, 1996.

S4.1.4.1 Except as provided in S4.1.4.2, each passenger car manufactured on or after September 1, 1989 shall comply with the requirements of S4.1.2.1. Any passenger car manufactured on or after September 1, 1989 and before September 1, 1993 whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt

and whose right front designated seating position is equipped with a manual Type 2 seat belt so that the seating position complies with the occupant crash protection requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not know in the exercise of due care that such vehicle is not in conformity with this standard.

* * *

S4.1.5 *Passenger cars manufactured on or after September 1, 1996.*

S4.1.5.1 *Frontal/angular automatic protection system.*

(a) Each passenger car manufactured on or after September 1, 1996 shall:

(1) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(2) At any front designated seating positions that are not "outboard designated seating positions," as that term is defined at 49 CFR 571.3, and at any rear designated seating positions that are not "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c) of this standard, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 and S7.2 of this standard; and

(3) At each front designated seating position that is an "outboard designated seating position," as that term is

defined at 49 CFR 571.3, and at each rear designated seating position that is a "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c) of this standard, have a Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3 of this standard, and, in the case of the Type 2 seat belt assemblies installed at the front outboard designated seating positions, meet the frontal crash protection requirements with the appropriate anthropomorphic test dummy restrained by the Type 2 seat belt assembly in addition to the means that requires no action by the vehicle occupant.

(b) For the purposes of this section, an *inflatable restraint system* means an air bag that is activated in a crash.

S4.1.5.2 *Passenger cars manufactured on or after September 1, 1996 and before September 1, 1997.*

S4.1.5.2.1 The amount of passenger cars complying with the requirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position shall be not less than 95 percent of the manufacturer's total production of passenger cars manufactured on or after September 1, 1996, and before September 1, 1997. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * *

S4.1.5.3 *Passenger cars manufactured on or after September 1, 1997.* Each passenger car manufactured on or

after September 1, 1997 shall comply with the requirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.2 *Trucks and multipurpose passenger vehicles with a GVWR of 10,000 pounds or less.* As used in this section, *vehicles manufactured for operation by persons with disabilities* means vehicles that incorporate a level change device (e.g., a wheelchair lift or a ramp) for onloading or offloading an occupant in a wheelchair, an interior element of design intended to provide the vertical clearance necessary to permit a person in a wheelchair to move between the lift or ramp and the driver's position or to occupy that position, and either an adaptive control or special driver seating accommodation to enable persons who have limited use of their arms or legs to operate a vehicle. For purposes of this definition, special driver seating accommodations include a driver's seat easily removable with means installed for that purpose or with simple tools, or a driver's seat with extended adjustment capability to allow a person to easily transfer from a wheelchair to the driver's seat.

S4.2.1 *Trucks and multipurpose passenger vehicles with a GVWR of 10,000 pounds or less, manufactured on or after January 1, 1976 and before September 1, 1991.* Each truck and multipurpose passenger vehicle, with a gross vehicle weight rating of 10,000 pounds or less, manufactured before September 1, 1991, shall meet the requirements of

S4.1.2.1, or at the option of the manufacturer, S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that forward control vehicles manufactured prior to September 1, 1981, convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles carrying chassis-mount campers may instead meet the requirements of S4.2.1.1 or S4.2.1.2.

S4.2.1.1 *First option – complete automatic protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.2.1.2 *Second option – belt system.* The vehicle shall have seat belt assemblies that conform to Standard 209 installed as follows:

(a) A Type 1 or Type 2 seat belt assembly shall be installed for each designated seating position in convertibles, open-body type vehicles, and walk-in van-type trucks.

(b) In all vehicles except those for which requirements are specified in S4.2.1.2(a), a Type 2 seat belt assembly shall be installed for each outboard designated seating position that includes the windshield header within the head impact area, and a Type 1 or Type 2 seat belt assembly shall be installed for each other designated seating position.

S4.2.2 *Trucks and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, manufactured on or after September 1, 1991 and before September 1, 1997.* Except as

provided in S4.2.4, each truck and multipurpose passenger vehicle, with a gross vehicle weight rating of 8,500 pounds or less and an unloaded vehicles weight of 5,500 pounds or less, manufactured on or after September 1, 1991 and before September 1, 1997, shall meet the requirements of S4.1.2.1, or at the option of the manufacturer, S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service, vehicles carrying chassis-mount campers, and vehicles manufactured for operation by persons with disabilities may instead meet the requirements of S4.2.1.1 or S4.2.1.2. Each Type 2 seat belt assembly installed in a front outboard designated seating position in accordance with S4.1.2.3 shall meet the requirements of S4.6.

S4.2.3 *Trucks and multipurpose passenger vehicles manufactured on or after September 1, 1991 with either a GVWR or more than 8,500 pounds but not greater than 10,000 pounds or with an unloaded vehicle weight greater than 5,500 pounds and a GVWR of 10,000 pounds or less.* Except as provided in S4.2.4, each truck and multipurpose passenger vehicle manufactured on or after September 1, 1991, that has either a gross vehicle weight rating which is greater than 8,500 pounds, but not greater than 10,000 pounds, or has an unloaded vehicle weight greater than 5,500 pounds and a GVWR of 10,000 pounds or less, shall meet the requirements of S4.1.2.1, or at the option of the manufacturer, S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles

carrying chassis-mount campers may instead meet the requirements of S4.2.1.1 or S4.2.1.2.

* * *

S4.2.5 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1994, and before September 1, 1997.*

S4.5.1 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1994, and before September 1, 1995.*

S4.2.5.1.1 Subject to S4.2.5.1.2 and S4.2.5.5 and except as provided in S4.2.4, each truck, bus and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1994 and before September 1, 1995, shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars). A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of standard.

S4.2.5.1.2 Subject to S4.2.5.5, the amount of trucks, buses, and multipurpose passenger vehicles specified in S4.2.5.1.1 complying with S4.1.2.1 (as specified for passenger cars) shall be not less than 20 percent of:

(a) The average annual production of trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1991, and before September 1, 1994, by each manufacturer that produced such vehicles during each of those annual production periods, or

(b) The manufacturer's total production of trucks, buses, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less during the period specified in S4.2.5.1.1.

S4.2.5.2 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1995 and before September 1, 1996.*

S4.2.5.2.1 Subject to S4.2.5.2.2 and S4.2.5.5 and except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1995 and before September 1, 1996, shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars). A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.2.5.2.2 Subject to S4.2.5.5, the amount of trucks, buses, and multipurpose passenger vehicles specified in S4.2.5.2.1 complying with S4.1.2.1 (as specified for passenger cars) shall be not less than 50 percent of:

(a) The average annual production of trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1992, and before September 1, 1995, by each manufacturer that produced such vehicles during each of those annual production periods, or

(b) The manufacturer's total production of trucks, buses, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less during the period specified in S4.2.5.2.1.

S4.2.5.3 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1996 and before September 1, 1997.*

S4.2.5.3.1 Subject to S4.2.5.3.2 and S4.2.5.5 and except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1996 and before September 1, 1997, shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars). A vehicle shall not be

deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.2.5.3.2 Subject to S4.2.5.5, the amount of trucks, buses, and multipurpose passenger vehicles specified in S4.2.5.3.1 complying with S4.1.2.1 (as specified for passenger cars) shall be not less than 90 percent of:

(a) The average annual production of trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1993, and before September 1, 1996, by each manufacturer that produced such vehicles during each of those annual production periods, or

(b) The manufacturer's total production of trucks, buses, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less during the period specified in S4.2.5.3.1.

S4.2.5.4 *Alternative phase-in schedule.* A manufacturer may, at its option, comply with the requirements of this section instead of complying with the requirements set forth in S4.2.5.1, S4.2.5.2, and S4.2.5.3.

(a) Except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of

5,500 pounds or less that is manufactured on or after September 1, 1994 and before September 1, 1995 shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars).

(b) Except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-tape trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1995 shall comply with the requirements of S4.1.2.1 (as specified for passenger cars) of this standard. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

(c) Each truck, bus, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1995, but before September 1, 1998, whose driver's seating position complies with the requirements of S4.1.2.1(a) of this standard by means not including any type of seat belt and whose right front passenger's seating position is equipped with a manual Type 2 seat belt that complies with S5.1 of this standard, with the seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1.

* * *

S4.2.6 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1997.* Each truck, bus, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, which is manufactured on or after September 1, 1997, shall comply with the requirements of S4.1.5.1 of this standard (as specified for passenger cars), except that walk-in van-type trucks and vehicles designed to be sold exclusively to the U.S. Postal Service may meet the requirements of S4.2.1.1 or S4.2.1.2 of this standard instead of the requirements of S4.1.5.1.

S4.2.6.1 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1997 and before September 1, 1998.*

S4.2.6.1.1 The amount of trucks, buses, and multipurpose passenger vehicles complying with the requirements of S4.1.5.1(a)(1) of this standard by means of an inflatable restraint system shall be not less than 80 percent of the manufacturer's total combined production of subject vehicles manufactured on or after September 1, 1997 and before September 1, 1998. Each truck, bus, or multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1997 and before September 1, 1998, whose driver's seating position complies with S4.1.5.1(a)(1) by means of an

inflatable restraint system and whose right front passenger's seating position is equipped with a manual Type 2 seat belt assembly that complies with S5.1 of this standard, with the seat belt assembly adjusted in accordance with S7.4.2 of this standard, shall be counted as a vehicle complying with S4.1.5.1(a)(1) by means of an inflatable restraint system. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * *

S4.3 *Trucks and multipurpose passenger vehicles, with GVWR of more than 10,000 pounds.*

S4.3.1 *Trucks and multipurpose passenger vehicles with a GVWR of more than 10,000 pounds, manufactured in or after January 1, 1972 and before September 1, 1990.* Each truck and multipurpose passenger vehicle with a gross vehicle weight rating of more than 10,000 pounds, manufactured on or after January 1, 1972 and before September 1, 1990, shall meet the requirements of S4.3.1.1 or S4.3.1.2. A protection system that meets the requirements of S4.3.1.1 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.3.1.2.

S4.3.1.1 *First option – complete passenger protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.3.1.2 *Second option – belt system.* The vehicle shall, at each designated seating position, have either a Type 1 or a Type 2 seat belt assembly that conforms to S571.209.

S4.3.2 *Trucks and multipurpose passenger vehicles with a GVWR of more than 10,000 pounds, manufactured on or after September 1, 1990.* Each truck and multipurpose passenger vehicle with a gross vehicle weight rating of more than 10,000 pounds, manufactured on or after September 1, 1990, shall meet the requirements of S4.3.2.1 or S4.3.2.2. A protection system that meets the requirements of S4.3.2.1 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.3.2.2.

S4.3.2.1 *First option – complete passenger protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.3.2.2 Second option – belt system. The vehicle shall, at each designated seating position, have either a Type 1 or a Type 2 seat belt assembly that conforms to §571.209 of this part and S7.2 of this Standard. A Type 1 belt assembly or the pelvic portion of a dual retractor Type 2 belt assembly installed at a front outboard seating position shall include either an emergency locking retractor or an automatic locking retractor. If a seat belt assembly installed at a front outboard seating position includes an automatic locking retractor for the lap belt or the lap belt portion, that seat belt assembly shall comply with the following:

(a) An automatic locking retractor used at a front outboard seating position that has some type of suspension system for the seat shall be attached to the seat structure that moves as the suspension system functions.

(b) The lap belt or lap belt portion of a seat belt assembly equipped with an automatic locking retractor that is installed at a front outboard seating position must allow at least 3/4 inch, but less than 3 inches, of webbing movement before retracting webbing to the next locking position.

(c) Compliance with S4.3.2.2(b) of this standard is determined as follows:

(1) The seat belt assembly is buckled and the retractor end of the seat belt assembly is anchored to a horizontal surface. The webbing for the lap belt or lap belt portion of the seat belt assembly is extended to 75 percent of its length and the retractor is locked after the initial adjustment.

(2) A load of 20 pounds is applied to the free end of the lap belt or the lap belt portion of the belt assembly (i.e., the end that is not anchored to the horizontal surface) in the direction away from the retractor. The position of the free end of the belt assembly is recorded.

(3) Within a 30 second period, the 20 pound load is slowly decreased, until the retractor moves to the next locking position. The position of the free end of the belt assembly is recorded again.

(4) The difference between the two positions recorded for the free end of the belt assembly shall be at least 3/4 inch but less than 3 inches.

* * *

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1. An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly. An automatic belt may not be used pursuant to S4.5.3 to meet the requirements of S4.1.5.1(a)(3) for a Type 2 seat belt assembly at any seating position equipped with an inflatable restraint system pursuant to S4.1.5.2, S4.1.5.3, S4.2.6.1, or S4.2.6.2 of this standard.

S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

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